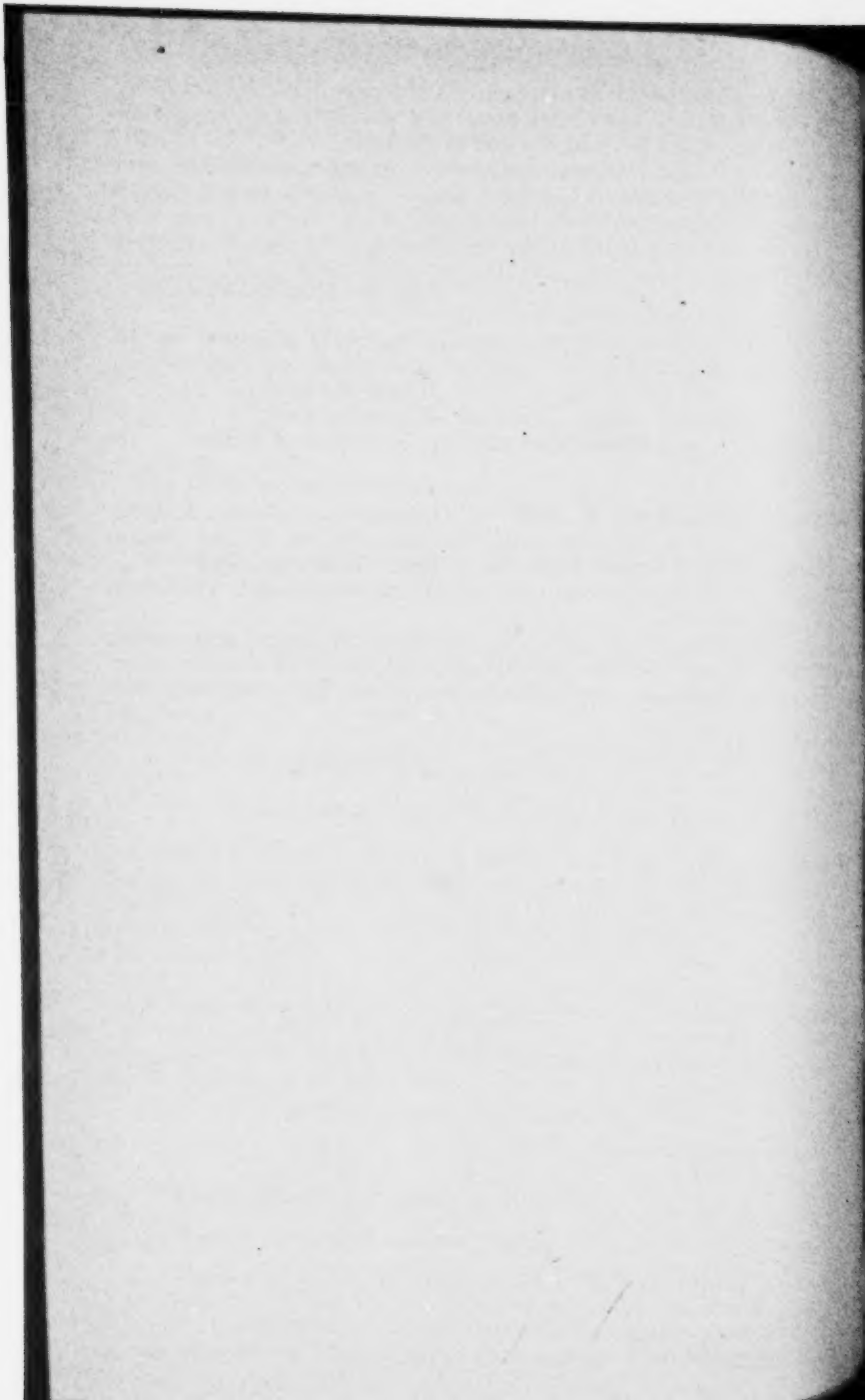

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 187.

OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellant,

against

THE UNITED STATES,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN BEHALF OF THE APPELLANT.

MAXWELL EVARTS,
Of Counsel for the Appellant.

S. C. Stanwood, Walker and Cedar Streets, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 187.

OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellant,

AGAINST

THE UNITED STATES,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN BEHALF OF THE APPELLANT.

Statement.

By the Act of Congress, approved May 4, 1870, and entitled "An Act Granting Lands to aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinville, in the State of Oregon" (16 U. S.

Stat., 94), a grant of land was given to the Oregon Central Railroad Company to aid in the construction of a railroad and telegraph line from Portland to Astoria and from a suitable point or junction near Forest Grove to Yamkill River near McMinville, in the State of Oregon. This grant prescribed primary limits, ten alternate sections in width per mile on each side of the line of the road, and indemnity limits extending five miles beyond such primary limits (Record, p. 11).

The railroad from Portland to the Yamkill River, near McMinville, was completed June 23, 1876, as provided in said act of Congress (Record, p. 12).

By the second section of the act of May 4, 1870, it was specially provided as follows:

> "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed."

The Oregon Central Railroad Company, and this appellant, the Oregon and California Railroad Company have ever since the completion of the railroad in 1876, demanded of the govern-

ment, the survey and patenting of the lands which they were entitled to under the grant given by said act of Congress (Record, p. 16).

On the sixth day of October, 1880, the Oregon Central Railroad Company sold and transferred to the appellant, the Oregon and California Railroad Company, all of its right, title and interest in and to the lands granted by the said act of Congress of May 4, 1870 (Record, p. 12), including the land in controversy which is part of Section 7, Township 2 South, Range 7 West, Willamette meridian (Record, p. 12).

Notwithstanding the demand of the railroad company for a survey of this land, the government delayed to file its official plat and survey thereof until July 27, 1893, more than fifteen years after the railroad was completed, and the company was ready and desirous of making a selection of the land (Record, p. 13).

All the odd sections within the indemnity limits of the grant to the railroad company were insufficient to make good the deficiency in the primary limits (Record, p. 16).

On the very day that the official plat and survey thereof was filed in the land office at Oregon City, Oregon, to wit, July 27, 1893, the Oregon

and California Railroad Company filed its selection indemnity list embracing the land in controversy (Record, p. 13), and thereafter and on October 19, 1895, a patent was duly issued to the railroad company therefor (Record, p. 14).

On the 12th day of January, 1891, Joseph H. Elison settled upon the land in dispute and continued to reside thereon and cultivated and improved the same. After the filing of the selection list by the company on July 27, 1893, and within ninety days therefrom, the said Ellison applied to the local land office at Oregon City, Oregon, for leave to file a homestead entry of the land occupied by him (Record, p. 13).

On November 3, 1897, the United States filed its bill in equity in the United States Circuit Court for the District of Oregon, seeking to set aside and cancel the patent from the United States of October 19, 1895, to the Oregon and California Railroad Company, and thereafter and on November 21, 1898, an amended bill of complaint was filed in said suit (Record, p. 10). To this amended bill, the defendant filed its plea (Record, p. 16), and on the 15th day of May, 1899, the case came on for hearing upon the bill of

complaint and the plea thereto, before the Honorable CHARLES B. BELLINGER, United States District Judge for the District of Oregon, who afterwards, and on the 27th day of April, 1901, entered an order overruling the plea and allowing the defendant time to further plead (Record, p. 19).

The defendant declined to further plead in the suit, and a final decree was entered on June 15, 1900, granting the prayer of the complainant, and setting aside and declaring null and void the patent theretofore issued by the United States to the Oregon and California Railroad Company on October 19, 1895 (Record, p. 21).

From said final decree an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit, which on May 16, 1901, affirmed the judgment of the Court below (Record, p. 28). From the final decree of the United State Circuit Court of Appeals, this appeal has been taken (Record, p. 29).

Specification of Errors.

The Circuit Court of Appeals erred:

I. In not reversing the decree of the Circuit Court entered herein on June 15, 1900, and

directing said Court to render a decree dismissing the bill of the United States.

II. In deciding that the United States was entitled to a decree vacating and setting aside the patent to the land in controversy issued to the Oregon and California Railroad Company, October 19, 1895.

III. In not deciding that the appellant, the Oregon and California Railroad Company was entitled to make the selection of the land in controversy and to receive a patent therefor, upon the ground that the status of such land, at the time of its selection, determined the right of the railroad thereto, and that at such time the land was public land of the United States, and then open to selection by the appellant under the grant of May 4, 1870.

IV. In not deciding that Elison who had come upon the land prior to the selection thereof by the appellant was a mere occupant and had no claim of any kind thereto.

V. In not deciding that the relative rights of the railroad company and the individual claimant were to be determined in favor of the former for the reason that it had first filed in the local land office the record evidence of its claim to the land in controversy.

Argument.

The main question in this suit is identical with the question arising in the case of Oregon and California Railroad Company vs. The United States, No. 186, October Term, 1902, which precedes upon the docket the appeal in this case, and we respectfully refer the Court to our brief in that case.

We, however, desire to urge upon the attention of the Court, an additional fact which is not found in Case No. 186. The granting acts in the two cases are different. In No. 186, it is the Act of Congress of July, 1866. In the case at bar, it is the Act of Congress of May 4, 1870 (See Appendix). This last act contains a provision which is not in the Act of 1866, and does not seem to be in the other Pacific Railroad acts. This provision is as follows:

> "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed."

The railroad was completed June 23, 1876. The lands were not surveyed and the plat thereof filed in the local land office until July 27, 1893,

seventeen years thereafter, and this is so, notwithstanding the fact, that during that time, the railroad company constantly demanded the survey by the government (Record, p. 16). The United States agreed by the terms of its granting act to survey the lands along the line of road, *with all convenient speed.* Instead of this, it neglects and fails for twenty-three years to cause a survey thereof to be made, and declines to permit its grantee to make such selection without a survey. During this delay of twenty-three years and long prior to the occupancy of the land by Elison, the railroad continuously demanded the survey and patenting thereof. If the mere occupancy of land within the indemnity limits of a railroad grant, is to deprive the railroad from selecting it, and if the delay of the government in filing its surveys is to be unlimited in extent, although the statute requires that it shall file them with all convenient speed, then the grant of indemnity lands under the acts of Congress is a mere nullity, and the railroads will be stripped of the gift which Congress intended should aid them in constructing their lines of road.

MAXWELL EVARTS.
Of Counsel for Appellant.

APPENDIX.

CHAP. LXIX.—*An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinnville, in the State of Oregon.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamkill river, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side-tracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

SEC. 2. *And be it further enacted*, That the commissioner of the general land office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: *And provided also*, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

SEC. 3. *And be it further enacted*, That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said *completed* [completed] sections.

SEC. 4. *And be it further enacted*, That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side-tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

SEC. 5. *And be it futher enacted*, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side tracks, and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semiannually in coin not exceeding the [rate] of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the district court of the United States, concurrently with the State courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

SEC. 6. *And be it further enacted*, That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date.

Approved, May 4, 1870.